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No. 86-253

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION

*and*

UNITED RETAIL & WHOLESALE EMPLOYEES UNION
LOCAL NO. 115 PENSION PLAN, *et al.*,
*Appellants,*

*v.*

YAHN & MCDONNELL, INC., *et al.*,
*Appellees.*

ON APPEALS FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

RICHARDS, LAYTON & FINGER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

ROBERT J. HARTER, JR.
Tiger International, Inc.
LAWRENCE M. NAGIN
The Flying Tiger Line Inc.
7401 World Way West
Los Angeles, California 90009
(213) 646-6161

*Of Counsel*

DOUGLAS D. BROADWATER
(*Counsel of Record*)
RICHARD LIEBESKIND, JR.
DONNA M. DESILVA
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

R. FRANKLIN BALOTTI
JESSE A. FINKELSTEIN
WILLIAM W. BOWSER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

*Attorneys for The Flying Tiger Line Inc., et al., as amici curiae in support of affirmance*

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## BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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## INTEREST OF AMICI CURIAE

The Flying Tiger Line Inc., the world's largest all-freight airline, is the principal operating subsidiary of Tiger International, Inc., a publicly traded corporation which has also

owned other trucking and freight companies.[1] Tiger submits this brief *amici curiae* in support of affirmance because it has a particular interest in the outcome of this proceeding. If this Court reverses the decision below, which held unconstitutional the presumption in arbitration that certain withdrawal liability determinations of multiemployer pension plan trustees are correct unless "unreasonable or clearly erroneous", 29 U.S.C. § 1401(a)(3)(A), a group of such plans will claim that Tiger must disprove as clearly erroneous their trustees' assertions that Tiger is a member of an "employer" control group jointly liable for approximately $36 million in withdrawal liability claims under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"). This withdrawal liability was allegedly incurred by Hall's Motor Transit Co. ("Hall's"), a former Tiger subsidiary, more than a year after Tiger had sold that subsidiary.

In 1980 Tiger purchased Hall's, an interstate trucking company founded in 1922. After the 1980 deregulation of interstate trucking, Hall's incurred substantial operating losses and by 1984 adverse financial developments in Tiger's other businesses effectively prohibited Tiger from advancing any additional financing to Hall's. After months of discussions with potential buyers and lenders, in January 1985 Tiger sold seventy-five percent of the Hall's stock to an unrelated company wholly owned by Hall's then-chief financial officer. Following the sale, Hall's was able to obtain significant wage concessions from its Teamster employees in return for an Employee Stock Ownership Plan and substantial additional financing from third-party lenders. Hall's operations and contributions to its many MPPAA pension plans continued until March 1986, when Hall's filed a voluntary petition for reorganization in the U.S. Bankruptcy Court for the Middle District of Pennsylvania. By the time of Hall's petition and concurrent cutback in operations, Tiger had not had any participation in or control of

[1] The Flying Tiger Line Inc. is 99% owned by Tiger International, Inc., which also owns Warren Transport, Inc., a company engaged in specialized hauling. These three entities are referred to herein collectively as "Tiger".

Hall's management or operations for more than a year and had no equity interest in Hall's.

Since the Hall's reorganization filing, the Hall's plans have made more than $36 million in MPPAA withdrawal liability claims against Hall's. Several Hall's plans also asserted their trustees' view that Tiger could be claimed to be an "employer" subject to MPPAA and jointly liable with Hall's for any Hall's withdrawal liability notwithstanding Tiger's divestiture of Hall's. On July 3, 1986 Tiger commenced an action in federal district court against the plans that asserted withdrawal liability claims against Hall's, seeking declarations (1) that Tiger and its affiliates are not members of an "employer" control group, 29 U.S.C. § 1301(b), jointly liable for Hall's withdrawal liability and (2) that MPPAA, including 29 U.S.C. § 1401(a)(3)(A), is unconstitutional on its face and as applied to Tiger. *See IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129 (3d Cir. 1986) (advising potential control group members to seek judicial declarations of their "employer" control group status).

The Hall's plans moved to dismiss. They argued that the "real" issue of Tiger's complaint arose from their trustees' prospective determinations that a principal purpose of Tiger's January 1985 sale of Hall's was to evade or avoid withdrawal liability, allowing these trustees to disregard that sale under 29 U.S.C. § 1392(c) and consider Tiger still within the Hall's "employer" control group liable for withdrawal liability subsequently incurred by Hall's. Tiger's purported "employer" status, described by the largest plan claimant as "essentially the equivalent of a fraud case" against Tiger, was claimed to be factual in nature and disputable by Tiger only under MPPAA procedures, particularly MPPAA arbitration.

On September 12, 1986 the district court ruled, *inter alia*, that it would hear and resolve the dispute on Tiger's "employer" status. *The Flying Tiger Line Inc. v. Central States, Southeast and Southwest Areas Pension Plan*, 7 E.B.C. 2385, 2390-91 (D. Del. 1986). The Hall's plans moved for reargument or a stay pending MPPAA arbitration. The Pension

Benefit Guaranty Corporation ("PBGC") filed a letter brief supporting the Hall's plans' motion to relegate any dispute on Tiger's "employer" status, including the plans' "evade or avoid" assertions, to MPPAA arbitration under 29 U.S.C. § 1401(a)(1). On October 17, 1986, the district court reversed its prior determination, concluded that prospective plan trustee determinations to disregard Tiger's sale of Hall's and treat Tiger as a jointly liable "employer" created a "need to develop a factual record" requiring MPPAA arbitration, and stayed Tiger's action pending such a MPPAA arbitration. 7 E.B.C. 2392, 2396-97 (D. Del. 1986). Tiger is appealing this decision to the U.S. Court of Appeals for the Third Circuit.[2] If unsuccessful on appeal, Tiger will be required to submit its claim not to be a MPPAA "employer" with Hall's to MPPAA trustee determination, review and arbitration before it can present that claim to a federal district court.

Shortly after the district court action was stayed, the Hall's plan with the largest withdrawal liability claim, Central States, Southeast and Southwest Areas Pension Plan ("Central States"), advised Tiger that its

> "Board of Trustees has determined that a principal purpose of the Hall's divestiture by [Tiger] was to avoid or evade withdrawal liability. Accordingly, the Board of Trustees has determined, pursuant to [29 U.S.C. § 1392(c)], that it must disregard that transaction and that [Tiger] is the employer responsible for Hall's withdrawal

[2] Nos. 86-5817, 5931, 87-3063 (consolidated). On December 4, 1986 the district court, stating it found the issues discussed in its two opinions "extremely difficult", amended its October 17 order to provide for permissive appeal, 28 U.S.C. § 1292(b), and stayed all further proceedings pending completion of appellate review. Tiger's petition to appeal was granted by the Court of Appeals on January 9, 1987. It is Tiger's position on appeal that its "employer" status is a proper question for judicial, and not arbitral, determination; that the "employer" issue is not converted to one for mandatory arbitration by the plans' reliance on an "evade or avoid" assertion; that the plans have no legally adequate basis to claim that the Hall's divestiture can be disregarded as sham under 29 U.S.C. § 1392(c); that Section 1392(c) does not of itself give rise to MPPAA arbitral jurisdiction; and that mandatory arbitration of Tiger's "employer" status, the predicate to arbitral jurisdiction here, is contrary to federal law.

> liability. . . . The amount of $1,741,349.51 [of a total withdrawal liability assessment of $15,539,816.66] is now past due and payable immediately."

Central States indicated its trustees' determination was based on affidavits submitted in the Delaware litigation by its employees and by a lawyer for another Hall's plan. Shortly thereafter Central States demanded a MPPAA arbitration, purportedly pursuant to 29 U.S.C. § 1401(a)(1), "seek[ing] an award confirming the determination of the Board of Trustees" that Tiger is liable for the claimed withdrawal liability.

If Tiger is forced to arbitrate its "employer" status, a reversal by this Court in the instant case will prevent Tiger from receiving a procedurally fair resolution of the legal and factual issues assertedly implicated by the Hall's plans' claims that Tiger is an "employer" jointly liable with Hall's for Hall's withdrawal liability.

## SUMMARY OF ARGUMENT

A party being deprived of property has a due process right to a decision by an unbiased decisionmaker. A scheme for resolving disputes about that deprivation that relies on biased decisionmakers incorporates a substantial likelihood of a biased and erroneous decision. That likelihood is not reduced and the denial of due process is not remedied if those biased decisions remain insulated from plenary review. Under MPPAA's dispute resolution procedures, biased plan trustees determine whether an employer has withdrawn and the amount of its resulting withdrawal liability, with chalienge and review of their determinations in mandatory MPPAA arbitrations that are required to presume trustee determinations correct unless unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3)(A) (the "Arbitral Presumption"). MPPAA does not provide for a resolution of withdrawal liability disputes by an impartial decisionmaker with full authority to consider the disputed issue *de novo* and plainly denies due process to alleged withdrawing employers.

In urging that the Third Circuit's decision be reversed, appellants assert that that court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability". PBGC Br. 18. Appellants insist that the trustee determinations insulated by the Arbitral Presumption are nondiscretionary, ministerial, "technical actuarial" or legislative, do not require historic fact-finding or weighing evidence and do not constitute case-by-case decisionmaking. Attempting to justify MPPAA's "stacked deck", appellants focus on plan selection of a method for calculating withdrawal liability and the resulting calculations and assert that these "determinations" are not "adjudications" and therefore due process does not require that they be made by a decisionmaker free from any bias or interest.

It is appellants' argument, not the decision below, that disregards the variety of case-specific determinations, including disputed factual determinations, that MPPAA plan trustees actually make in pursuing withdrawal liability claims. Elsewhere both plan trustees and the PBGC maintain that virtually any dispute with a plan's withdrawal liability determination and assessment is subject to challenge only within MPPAA's procedures for "reasonable" trustee review, arbitration constrained by the Arbitral Presumption and judicial review constrained by the similar presumption in 29 U.S.C. § 1401(c). The PBGC has urged federal courts and advised MPPAA plans that the MPPAA dispute procedures apply to a wide range of plan trustee determinations. Lower court decisions recognize that a MPPAA plan may, in addition to determining the amount of withdrawal liability, determine and then relegate to MPPAA dispute procedures issues of whether a withdrawal has occurred, the time and extent of that withdrawal and the applicability of statutory exclusions of certain events from liability-triggering withdrawals. Even if limited to the fact of withdrawal and calculation of the resulting withdrawal liability, those determinations are sufficiently case-specific and fact-based adjudications of property interests to be matters on which a purportedly liable employer is entitled to an unbiased

decisionmaker. MPPAA's procedures nowhere provide or permit such an unbiased decision.

This Court's decisions recognize that even the appearance of bias or interest will disqualify a decisionmaker. Appellants' argument, that plan trustees are not necessarily compelled by their fiduciary duties to maximize withdrawal liability claims against every withdrawn employer, does not address or rebut the fact that plan trustees are free to be biased against withdrawn employers; owe fiduciary duties solely to the plans and not to employers; are unlikely to resist bias in favor of their plans; have clear incentives for bias against withdrawing employers; and have repeatedly demonstrated their bias against assertedly withdrawing employers in attempts to increase withdrawal liability receipts. Biased plan trustees making case-specific, discretionary (and assertedly factual) determinations of withdrawal liability plainly violate the Due Process clause of the Fifth Amendment, and seriously slanted MPPAA arbitral review does not constitute the *de novo* inquiry by an unbiased decisionmaker necessary to cure that denial of due process.

## ARGUMENT

### THE PRESUMPTIVE VALIDITY OF PLAN DETERMINATIONS MANDATED BY 29 U.S.C. § 1401(a)(3)(A) UNCONSTITUTIONALLY DEPRIVES EMPLOYERS OF THEIR DUE PROCESS RIGHT TO AN IMPARTIAL DECISIONMAKER.

It is a basic precept of due process that the process accorded a person threatened with a deprivation of life, liberty or property must include at a minimum an unbiased and disinterested decisionmaker. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court traced this requirement as far back as fourteenth-century England, *id.* at 524, and concluded:

> "All questions of judicial qualification may not involve constitutional validity. . . . But it certainly violates the Fourteenth Amendment, and deprives a defendant in a

> criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523.

This "requirement of neutrality has been jealously guarded by this Court", *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); applies equally under the Fifth Amendment to federal procedures, *id.; Schweicker v. McClure*, 456 U.S. 188 (1982); governs civil administrative proceedings, *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); and is infringed if the decisionmaker is an officer or agent of an entity with a pecuniary interest in the proceedings, even though that officer does not himself have a direct, personal, pecuniary interest in the proceedings. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Proof of actual influence, bias or error in the challenged proceeding is not necessary to find a violation of this requirement of neutrality:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Every procedure which would offer a possible temptation to the average man* as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true* between the State and the accused, denies the latter due process of law." *Tumey, supra*, 273 U.S. at 532 (emphasis added); *accord Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1587 (1986).

Applying the principle of these cases, the Court of Appeals for the Third Circuit found that MPPAA's dispute procedures violate the Fifth Amendment insofar as they grant a presumption of correctness, reversible only if proven "unreasonable or clearly erroneous", to determinations by pension plan trustees who "have a natural interest and may even consider it a duty to maximize the fund by extracting as much money as possible

from withdrawing employers." J.S. App. 21a.[3] MPPAA dispute procedures have been urged and held to include review of case-specific adjudicatory determinations by trustees who have substantial temptation to reach biased results. Because MPPAA dispute procedures do not require or even permit *de novo* review of those determinations, this Court should affirm the decision below and hold that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment.

**A. *MPPAA Trustee Determinations Are Not Limited by the Statute or in Practice to "Legislative", "Nonadjudicative" or "Nondiscretionary" Matters.***

Appellants' present arguments rely heavily on the opinion for the court in *Keith Fulton & Sons, Inc. v. New England Teamsters*, 762 F.2d 1137 (1st Cir. 1985) (en banc), and Chief Judge Seitz's dissent in the case now on review. J.S. App. 35a-40a. Both these opinions proceed from the mistaken premise that MPPAA plan trustees make only ministerial or nonadjudicative decisions, primarily calculations, and lack the

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[3] Contrary opinions in other courts of appeals have relied on a narrow reading of the scope of "determinations" subject to the Arbitral Presumption. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1137, 1140 (1st Cir. 1985) (en banc); *Board of Trustees of the Western Conf. of Teamsters Pension Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Others have recast that presumption merely to shift the burden of proof in arbitration and not also to raise that burden from the simple preponderance of evidence in a *de novo* inquiry to the "unreasonable or clearly erroneous" standard MPPAA actually specifies. *Washington Star Co. v. International Typographical U. Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). In *Washington Star*, the court also stated: "We conclude that the trustees' fiduciary duties require them to act neutrally and reasonably in making withdrawal liability determinations." 729 F.2d at 1511. Similarly, the Second Circuit concluded that, because both employees and employers appointed trustees, the trustees were not biased. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr v. Bakery, Confec. and Tobacco Workers*, 467 U.S. 1257 (1984).

discretion necessary for them unfairly to assess withdrawal liability against a withdrawn employer:

> "We emphasize first that we do not perceive the trustees to be performing an adjudicatory role when they calculate the withdrawal liability, and so we do not believe we in any way mar the purity of the judicial process in deciding that their bias is not of constitutional dimension." *Keith Fulton, supra*, 762 F.2d at 1140; *see* J.S. App. 35a.

Appellants adopt a similar approach to justify reversal here. They assert that an important factor in the plans' ability to collect withdrawal liability is their right to rely in mandatory arbitration on the Arbitral Presumption,[4] which states:

> "For purposes of any proceeding under this section [1401], any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).

On the face of the MPPAA statute, the scope of matters entitled to this presumption is the same as the scope of disputes subject to arbitral jurisdiction:

> "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).

Appellants urge that this statutory scheme for enforcing the withdrawal liability claims of plan trustees does not violate due process because it does not confer upon MPPAA plan trustees

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[4] Brief for Appellant PBGC ("PBGC Br."), p. 41; Brief for Appellant United Retail & Whse. Emps. Teamsters U. Local No. 115 Pension Plan ("Plan Br."), pp. 32-33; Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans ("NCCMP Br."), p. 4.

any authority to make case-specific, fact-based determinations. According to the PBGC's brief:

> "[Plan] trustees do not engage in any of the functions that normally attend an adjudicative decision. They do not determine the 'truth' of disputed versions of historical facts, they do not make credibility determinations, and they do not seek to arrive at the 'right' answer to a question". PBGC Br. 19.

The trustee "determinations" subject to MPPAA arbitration and the Arbitral Presumption are claimed to be so "extremely limited and circumscribed by statutory directives", PBGC Br. 34, that an unbiased decisionmaker is unnecessary. Appellants repeatedly justify the Arbitral Presumption by quoting legislative history to argue that this heavy presumption was designed and intended by Congress to reduce disputes and delay over "technical actuarial matters".[5]

Even appellants' limited view of the scope of MPPAA dispute procedures recognizes that plan trustees have the authority to make case-specific fact-based determinations in calculating withdrawal liability. Therefore an unbiased decisionmaker is constitutionally required. Tiger's own experience, and that of many other entities whose disputes have been reported, also demonstrates that ministerial calculations are not all that trustees determine or all that the Arbitral Presumption is claimed to protect. Appellants' rationale fails entirely because in practice MPPAA trustees and the PBGC assert substantial trustee authority to "determine" a wide range of issues against purportedly liable companies and demand that these assessments can be challenged only under mandatory MPPAA arbitrations, where they are sheltered by the Arbitral Presumption. These trustee determinations are the basis for massive liability assessments on which payments can begin even before MPPAA procedures are completed. 29 U.S.C.

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[5] PBGC Br. 8; Plan Br. 7; PBGC Jurisd. Statemt. 6 n.6; NCCMP Br. 13; *quoting* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076; The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20 (Comm. print 1980).

§ 1401(d). Their determinations are not so free of discretion or so ministerial in nature that they may constitutionally be presumed correct unless "clearly erroneous".

MPPAA provides that "when an employer withdraws from a multiemployer plan, the plan sponsor . . . shall (1) determine the amount of the employer's withdrawal liability". 29 U.S.C. § 1382.[6] Although this language does not expressly direct plan trustees to determine whether a withdrawal has occurred, federal courts have held that the fact that an employer has withdrawn within the meaning of MPPAA, including necessarily related issues of whether an exemption is applicable in a particular case, is an appropriate plan trustee determination and is, in the usual course, subject to the MPPAA dispute procedures. "The determinations generally required by 29 U.S.C. §§ 1381 through 1399 involve questions of whether an employer has . . . withdrawn from a plan and what the amount, if any, of its consequent liability should be."[7] Courts have also ordered arbitration (or foreclosed employers who failed to arbitrate from raising defenses) on a variety of other trustee determinations that are undeniably fact- and case-specific:

—Whether under the provisions of a collective bargaining agreement an employer effected a permanent

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[6] Subject to various exceptions and conditions, "a complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). Subject to various exceptions and criteria, "there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year (1) there is a 70-percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation." 29 U.S.C. § 1385(a).

[7] *Baldwin v. Shopmen's Ironworkers Pension Trust*, 3 E.B.C. 1713, 1716 (C.D. Cal. 1982); *see, e.g., Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 284 (3d Cir. 1986). The PBGC has likewise advised that "a dispute over . . . a determination regarding the occurrence of a withdrawal would be subject to the arbitration provision of" MPPAA. *E.g.*, PBGC Op. 83-18, 10 Pens. Rep. (BNA) 1819 (1983). *See* pp. 13-16 *infra*. In urging reversal, the brief *amicus curiae* of the Mine Workers expressly acknowledges that this determination is made by the plan trustees. Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae in Support of Appellant ("UMW Br."), p. 17.

cessation of operations on a particular date, and whether a binding agreement to withdraw from a MPPAA plan existed. *Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986).

—Whether sale of certain facilities constituted a withdrawal or an exempt "sale of assets" under 29 U.S.C. § 1384. *Grand Union Co. v. Food Employers Labor Rels. Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987); *see also New York State Teamsters Conf. Pension & Ret. Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1009 (N.D.N.Y. 1985).

—Whether an employer's cessation of contributions during a labor dispute constituted a complete withdrawal or was within the statute's "labor dispute" exception, 29 U.S.C. § 1398, *Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 127 (D.C. Cir. 1984).

—Whether two motor freight terminals eight miles apart were separate "facilities" within the meaning of 29 U.S.C. § 1397(a)(2) for calculating withdrawal liability. *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 634 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *accord Williamson Shaft Contracting Co. v. United Mine Workers 1974 Pension Plan*, 585 F. Supp. 633, 634 (W.D. Pa. 1984).

The PBGC here urges that the lower court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability." PBGC Br. 18. Yet the PBGC has repeatedly advised MPPAA plans that plan trustees are to make a substantial range of unconstrained, case-specific determinations and that these determinations are subject to MPPAA dispute procedures, including mandatory arbitration under Section 1401(a). The PBGC has opined:

"Under the multiemployer provisions of ERISA, *the initial responsibility for deciding factual questions necessary to determine whether any particular action constitutes a*

> *withdrawal* from a multiemployer plan lies with the plan sponsor. . . . [A]ny disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts." PBGC Op. 86-21 (1986) (emphasis added).[8]

The PBGC has also opined that plan trustees may determine and subject to MPPAA dispute procedures the interpretation of statutory provisions:

> "The MPPAA places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom on the plan sponsor. Similarly the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for determining such questions as the meaning of 'substantially all' in [29 U.S.C. § 1389]. If a plan sponsor makes any such determination, and the employer objects in any way, ERISA provides in [29 U.S.C. §§ 1399 and 1401] a procedure for resolving the dispute." PBGC Op. 83-23 (1983).[9]

The determination that a withdrawal has occurred and the issues reflected in that determination permit plan trustees substantial latitude in making decisions that result in imposition

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[8] The PBGC Opinions cited herein are available on LEXIS, Labor library, PBGC file.

[9] The PBGC states that its position is that a MPPAA arbitrator need not presume that a plan's legal conclusions are correct, although this position was not incorporated in its final rule on MPPAA arbitration. PBGC Br. 40 n.33. The PBGC's present reliance on this position ignores the trustees' initial ability to "determine" both the facts and the law and their resulting ability to limit review. Plan trustees can formulate their "determinations" and characterize issues as "factual" or "legal". In doing so plan trustees can both achieve the desired result and substantially protect that result from any *de novo* review limited to purely legal questions. In arguing that a MPPAA dispute should not go forward in court as opposed to arbitration, the PBGC recently argued in the Seventh Circuit that "characterizing withdrawal liability issues as 'purely legal' or 'factual' is easier in theory than in practice . . . and in any event an inventive employer will be able to characterize at least one issue as 'purely legal.' " PBGC Br. in *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, Nos. 86-1963, 1964, 2241 (7th Cir. Sept. 15, 1986), p. 10.

of withdrawal liability. Among the case-specific questions the PBGC has expressly opined that plan trustees should determine and then subject to MPPAA dispute procedures and presumptions are the following:

> —Whether a cessation of contributions during a labor dispute constitutes a withdrawal as a "permanent cessation" under 29 U.S.C. § 1383(a) or an exempt "suspension during a labor dispute" under 29 U.S.C. § 1398. PBGC Op. 82-21 (1982).
>
> —Whether a shift of operations from one discrete geographic location to another is a continuation of operations or a cessation of operations at a facility, triggering a partial withdrawal, and whether the change in location was a "sham" intended to avoid the occurrence of a withdrawal. PBGC Op. 82-22 (1982).
>
> —Whether a company that leased employees from a MPPAA employer but had not itself signed a collective bargaining agreement or contributed to a MPPAA plan nonetheless had a duty under federal labor law to make pension contributions and thus had an obligation to pay withdrawal liability under 29 U.S.C. § 1392(a), and whether termination of the leasing agreement constituted a withdrawal. PBGC Op. 85-14, 13 Pens. Rep. (BNA) 30 (1986).
>
> —Whether "under all the circumstances" the principal purpose of a transaction that would otherwise not constitute a withdrawal was intended to evade or avoid withdrawal liability and therefore could be determined to be a liability-triggering withdrawal. PBGC Op. 85-15, 13 Pens. Rep. (BNA) 29-30 (1986).

Even calculations determining the amount of withdrawal liability are premised in part on case-specific trustee determinations subject to the MPPAA dispute procedures. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 674 & n.43 (N.D. Ill. 1986) (holding that applying Section

1401(a)(3)(A) to calculations of withdrawal liability violates due process).[10] Plan trustees, with the encouragement of the PBGC, have claimed the authority in the course of their withdrawal liability calculations to disregard transactions that they believe evidence "a principal purpose . . . to evade or avoid" withdrawal liability. 29 U.S.C. § 1392(c); *see Robbins, supra*, 636 F. Supp. at 657 n.27; PBGC Op. 83-10, 10 Pens. Rep. (BNA) 1387 (1983) (determination of contribution base may ignore liability-reducing transactions determined to "evade or avoid" liability).

Tiger's own experience demonstrates the wider range of determinations that MPPAA plans and the PBGC claim to be within the authority of the plan trustees and subject to dispute only under MPPAA dispute procedures and the Arbitral Presumption. In the *Flying Tiger* action, the district court concluded in its second opinion that the plans' assertions that Tiger was an "employer" with Hall's, notwithstanding the divestiture of Hall's by Tiger a year before any withdrawal liability was incurred, raised issues that must be arbitrated between the plans and Tiger because the plans purported to disregard the divestiture as a sham transaction intended to "evade or avoid" MPPAA liability. The district court stated that "once facts are in dispute . . . the court's task becomes more difficult and intercedes into the proper role of the arbitrator". 7 E.B.C. at 2397. The PBGC had advised the district court that the question of Tiger's purported "employer" status under MPPAA—the dispute the plans insisted could only be arbitrated—should be arbitrated as a disputed plan determination under Section 1401(a):

> "The PBGC believes . . . that arbitration should proceed. . . . [T]he PBGC agrees that the Court's concerns can be

[10] In *Combs v. Western Coal Corp.*, 611 F. Supp. 917 (D.D.C. 1985), a plan's admittedly erroneous fact determination that a division was a distinct entity from the withdrawn employer resulted in an over-assessment of withdrawal liability of approximately $250,000. The plan recognized its error but refused to alter its assessment and maintained that the employer, which had requested arbitration, had failed to properly initiate arbitration pursuant to plan rules. *Id.* at 919. The court agreed that the employer had failed properly to initiate arbitration and entered judgment for the withdrawal liability amount calculated from the fund's admitted factual error. *Id.* at 923.

> alleviated by the 'alternative' suggested by Central States . . . of a 'stay' of this action pending arbitration of the issues relating to the identity of the employer in *Tiger* . . . [N]othing in the statute prohibits a court from ordering the statutorily mandated arbitration. See 29 U.S.C. § 1401(a)(1)." Letter of E. R. Mackiewicz (by P. H. Gould) to Hon. C. M. Wright, dated October 6, 1986.

The subsequent "determination" by the Central States trustees that Tiger was an "employer" with Hall's because in the trustees' view "a principal purpose of the Hall's divestiture . . . was to avoid or evade withdrawal liability" can only be described as a case-specific attempt to adjudicate Tiger's liability. Central States' attempts to force dispute of this "determination" into a MPPAA arbitration are obviously designed to avoid *de novo* inquiry by an unbiased decisionmaker.

MPPAA cannot fairly be read to state that trustee determinations do not encompass case-specific and factual determinations of liability requiring an unbiased decisionmaker. The Hall's plans persuaded the district court that Tiger's case should be distinguished from other cases refusing to compel arbitration of "employer" status because their disputed factual assertions presented the equivalent of a fraud case. *Flying Tiger, supra*, 7 E.B.C. at 2397. Other courts have accepted the arguments of MPPAA plans and the PBGC and ordered arbitration of other MPPAA disputes on the ground that a factual issue was present. *E.g., Warner-Lambert, supra*, 791 F.2d at 287-88; *Williamson Shaft, supra*, 585 F. Supp. at 635. If Section 1401 is properly read to limit arbitration to disputes about trustees' ministerial calculations of withdrawal liability, then the decisions compelling arbitration of other, much broader disputes arising from withdrawal liability claims cannot be correct.

To support the view that no "adjudication" is implicated in a trustee determination and the right to an impartial decisionmaker does not apply, appellants and their *amici* rely on four decisions of this Court. Their reliance is misplaced. In each of those cases the Court found that no possibility of bias or

interest was shown. *Schweicker v. McClure*, 456 U.S. 188, 196 (1982) ("no basis" for conclusion of bias); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("too remote and insubstantial"); *Friedman v. Rogers*, 440 U.S. 1, 18 (1979); *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 496 (1976). Moreover, the fact determinations of the allegedly biased decisionmaker were subject to *de novo* review in *Marshall*, 446 U.S. at 245, and in *Hortonville*, 426 U.S. at 485, 494 ("no possibility of an erroneous factual determination"), and the regulatory scheme in *Schweicker* provided for two *de novo* reviews, by a reviewing official and a hearing officer. 456 U.S. at 191. Those cases do not indicate that due process permits a critical determination of liability, however ministerial, to be entrusted to a biased party and insulated from *de novo* review.[11] *Cf. Dixon v. Love*, 431 U.S. 105, 109-10, 113-14 (1977) (examining procedural remedies to correct deprivation of driver's license based on clerical error).

**B. *Multiemployer Plan Trustees Are Undeniably Biased in Favor of Those Plans and Cannot "Hold the Balance Nice, Clear and True" Between the Plan and its Adversary—the Withdrawing Employer.***

The withdrawal liability determinations made by MPPAA trustees commonly encompass case-specific determinations based on historic facts and need an unbiased, disinterested decisionmaker before their enforcement can have any claim to due process. The trustees' fiduciary obligations to their plans create a clear possibility of favoritism toward the plan and against the withdrawn former participant sufficient to disqualify them as unbiased decisionmakers.

Addressing the apparent bias of plan trustees, appellants and their *amici* effectively admit that, whether or not plan trustees are legally obligated to be biased to maximize with-

[11] *See Wolkenstein v. Reville*, 694 F.2d 35, 39-41 (2d Cir. 1982) (Friendly, J.), *cert. denied*, 462 U.S. 1105 (1983) (examining and rejecting the argument that the determination whether a public employee had engaged in a strike and the penalty to impose on a public employee who had done so was not adjudicative).

drawal liability in every case, they are in fact biased.[12] The appellant plan, whose trustees' determinations are challenged here, accepts that those trustees are biased but says the bias is entirely appropriate:

> "The bias of the trustees is permissible because the trustees are *obligated by Congress to be biased in favor of pension plans.* This 'bias' mirrors the 'bias' of MPPAA. . . . By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for *what is at issue is what is best for the plan.*" Plan Br. 30 (emphasis added).[13]

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[12] Multiemployer plan trustees have personal and institutional interests adverse to the allegedly withdrawing employer and therefore could not be considered unbiased individuals even were they free of their fiduciary obligations. Employee trustees are appointed by the union and may seek to use withdrawal liability to increase benefits and thereby gain or keep the support of their constituents. There is no reason to assume that union trustees will be indulgent toward employers, particularly employers withdrawing as the result of ceasing operations covered by the collective bargaining agreement with that union. Employer trustees may seek to rely on withdrawal liability assessments to reduce the need for increases in contributions. Employer trustees' constituents—employers *remaining* in the plan—have economic interests directly opposed to the interests of the *withdrawing* employer or other companies that might be claimed liable with the former plan participant. " 'Employer withdrawals . . . reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels' ". *Pension Ben. Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984) (citation omitted).

[13] The trustees' single-mindedness was also emphasized by MPPAA's Senate sponsor:

> "In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind." 126 Cong. Rec. 20182 (1980) (Sen. Williams).

The appellant plan's view accords with Judge Aldrich's metaphor for the plight of the withdrawing employer:

> "[H]e finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight." *Keith Fulton, supra*, 762 F.2d at 1146 (Aldrich, J., dissenting).

It does not push Judge Aldrich's metaphor too far to suggest that the Arbitral Presumption favoring the plan means that anyone forced into the MPPAA ring with a plan can win only by a clear knockout.

The plan trustees in this case obviously understand that their duty in determining withdrawal liability is to serve the interests of the plan and is not to "hold the balance nice, clear and true" between the plan and the purportedly withdrawn employer whose claimed liability to the plan is at issue. As the court below recognized, this duty compels all plan trustees to resolve MPPAA withdrawal liability issues in favor of the plan's interests. Appellants concede that the trustees are obliged "to achieve a result solely in the interest of plan participants and beneficiaries." PBGC Br. 32; *accord* Plan Br. 21. A decisionmaker whose only inquiry in a case before him is whether his principal, one of the parties before him, desires a particular outcome is clearly faced with "a possible temptation . . . which might lead him not to hold the balance nice, clear and true" between the plan and the employer. *Tumey, supra,* 273 U.S. at 532.

Another response of appellants to the obvious bias of the trustees is to posit that plan trustees might, to serve long-term interests of the plan in encouraging new employer enrollment, choose occasionally to forbear from overreaching. PBGC Br. 31-33; Plan Br. 23. Appellants suggest that trustees "must also consider whether minimizing withdrawal liability assessments to encourage employers to enter the plan would further Congress's goal of long-term stability." PBGC Br. 34; *accord* Plan Br. 21, *quoting Keith Fulton, supra,* 762 F.2d at 1142-43. Appellants give no indication or reason to believe that any MPPAA plan has minimized withdrawal liability claims to encourage new employers.[14]

[14] A plan interested in encouraging new membership presumably would be more likely to avail itself of the optional "free look" rule for new employers, 29 U.S.C. § 1390, than to minimize the withdrawal liability of a former employer in the hope that a prospective new employer would be led to believe that the plan will be fair to it and therefore join. The Comptroller General's study cited by appellants states that 89% of surveyed MPPAA plans choose not to offer the "free look" option, a statistic that indicates that trustees have not been much motivated by solicitude to new entrants. Comptroller General's Report, *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans,* GAO/HRD-85-58, p. 62 (1985).

Congress created in MPPAA an administrative scheme that permits plan trustees to make withdrawal liability determinations, decisions that the Fifth Amendment requires be made or reviewed *de novo* by an unbiased and disinterested decisionmaker if they are to be enforceable liabilities. The likely result of the trustees' bias is that they will err in favor of their plans. Indeed, the National Coordinating Committee asserts in its *amicus* brief that almost half of the reported MPPAA arbitrations concluded that the trustees' determination under review was "unreasonable or clearly erroneous". NCCMP Br. 14 & n.10. It stands to reason that some portion of the other half of the arbitrated trustee determinations were also erroneous, although not sufficiently "clearly erroneous" to overcome the Arbitral Presumption. Even under the "flexible" approach to due process urged by appellants, Plan Br. 18; PBGC Br. 29; *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a procedural scheme likely more than half the time to produce an erroneous result favoring one side cannot pass constitutional muster as adequately assuring a correct result. Moreover, the right to an unbiased decisionmaker cannot be balanced away.[15]

The MPPAA provision challenged here is not constitutional because Congress intended to favor pension plans, as appellant plan appears to argue, Plan Br. 30, or because a fairer procedure would be a greater administrative burden on these plans, as the PBGC maintains. PBGC Br. 41-42. The purported hardship to plans of increased administrative ex-

[15] The Court of Appeals correctly recognized that this Court's decisions in *Mathews v. Eldridge* and similar cases does not authorize courts to balance the value of an unbiased decisionmaker against the cost of providing one. J.S. App. 20a. *Mathews* and cases applying it recognize that an unbiased decisionmaker is part of the minimum required in every case. 424 U.S. at 344; *accord Arnett v. Kennedy*, 416 U.S. 134 (1974) (White, J., concurring); *see, e.g., Schweicker, supra; Marshall v. Jerrico, supra; Mackey v. Montrym*, 443 U.S. 1, 13 (1979); *Parham v. J.R.*, 442 U.S. 584, 606 (1979); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977). An impartial decisionmaker, like notice and an opportunity to be heard, is a fundamental element of due process not subject to balancing away. *See Memphis Light, Gas & Water Div'n v. Craft*, 436 U.S. 1, 15 (1978); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975).

pense (much of it recoverable if their claims are upheld, 29 U.S.C. §§ 1401(a)(2), 1451(e)), and their preference for ease in using the "atomic bomb of withdrawal liability" (as one Hall's plan aptly characterized it to the *Flying Tiger* district court) does not extinguish the due process right of an employer to an unbiased adjudicative decision of his liability.

### C. *Requiring that a MPPAA Arbitration Accept Biased Trustee Determinations Unless Clearly Erroneous Prevents an Employer from Receiving Due Process in that Arbitration.*

The Court of Appeals correctly concluded "that where an initial hearing is tainted by bias, arbitration cannot provide the requisite fair hearing if the arbitration is not *de novo*." J.S. App. 27a.[16] The lower court decided that "a full and fair *de novo* hearing before an arbitrator" would cure the bias; that Section 1401(a)(3)(A) could be severed from the remainder of the MPPAA scheme; and that "the severing of § 1401(a)(3)(A) rescue[s] the scheme's constitutionality". J.S. App. 31a. This Court should affirm these conclusions.

MPPAA's challenged presumption against the employer cannot fairly be construed, as the Mine Workers urge, merely to assign the burden of proof to the employer. UMW Br. 19. Congress's use of the well understood term "clearly erroneous"

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[16] The court relied on its earlier decision in *Goodman v. Laborers' Int'l Union*, 742 F.2d 780, 785 (3d Cir. 1984), that less than a full *de novo* determination on a new record would be insufficient to cure a decision tainted by bias. The precise issue in *Goodman* and similar cases was whether labor union procedures in disciplining a member constituted a "full and fair hearing" under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(5). *Accord Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 821 (9th Cir. 1982); *Rosario v. Ladies Garment Cutters' U.*, 605 F.2d 1228, 1243 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *see Perry v. Milk Drivers' and Dairy Emps. U.*, 656 F.2d 536, 539 (9th Cir. 1981) (*de novo* review satisfies LMRDA). The rule in *Goodman* accords with the views of other courts that a trial *de novo* would cure a biased determination. *Marshall v. Jerrico*, *supra*, 446 U.S. at 245; *Commonwealth of Pennsylvania v. United States*, 781 F.2d 334, 337 (3d Cir. 1986); *Wolkenstein v. Reville*, *supra*, 694 F.2d at 43. These three cases reason that *de novo* redetermination would cure a biased decision, but none concluded that a biased decision was present or held that *de novo* review is constitutionally sufficient.

to constrain arbitral review plainly sets out a greater burden than the "preponderance of the evidence" standard that *de novo* review entails.[17] This Court recently explained Fed. R. Civ. P. 52(a)'s "clearly erroneous" standard:

> "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard . . ., appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985), *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

This Court should construe statutes such as MPPAA to avoid constitutional questions if a saving construction is "fairly possible", but

> "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; '"[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute" or judicially rewriting it.' *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961))." *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3252 (1986).

Appellants claim Congress intended in MPPAA to reject "a procedure aimed at reaching the 'fairest' result to employers [because that] would instead be unfair to plans" and to enact instead "litigation-dampening presumptions", PBGC Br. 43-45, that were "designed by Congress to assist multi-employer

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[17] Congress's use of a term with a long-settled meaning usually requires the inference that Congress intended to adopt that meaning. *National Labor Rels. Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

plans". Plan Br. 33. Such a congressional intent would not justify depriving employers of due process, but these arguments about Congress's purpose show just how hard it is to construe this language of MPPAA in a manner consistent with due process and the purported congressional purpose.

Tiger joins appellees in urging that the Arbitral Presumption is unconstitutional, even when invoked to protect trustee determinations on only "technical actuarial matters" that purportedly permit minimal scope for trustee bias. Should the Court reject that argument and adopt appellants' view of the very limited scope of matters subject to mandatory MPPAA arbitration and the Arbitral Presumption, this saving construction should expressly construe Sections 1401(a)(1) and 1401(a)(3)(A) to apply only to such limited matters. The Arbitral Presumption cannot constitutionally be applied to the wider range of case-specific claims and findings repeatedly made by MPPAA plans and claimed by both MPPAA plans and the PBGC to be plan trustee determinations subject to mandatory MPPAA arbitration and sheltered by the Arbitral Presumption.

## CONCLUSION

For the foregoing reasons, and those set forth in the brief of the appellants and in the opinion below, the Court should affirm the decision below that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Respectfully submitted,

DOUGLAS D. BROADWATER
(*Counsel of Record*)
RICHARD LIEBESKIND, JR.
DONNA M. DESILVA
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

R. FRANKLIN BALOTTI
JESSE A. FINKELSTEIN
WILLIAM W. BOWSER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

*Attorneys for The Flying Tiger Line Inc., et al., as amici curiae in support of affirmance*

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

RICHARDS, LAYTON & FINGER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

ROBERT J. HARTER, JR.
Tiger International, Inc.

LAWRENCE M. NAGIN
The Flying Tiger Line Inc.
7401 World Way West
Los Angeles, California
(213) 646-6161

*Of Counsel*